STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2005
v	No. 254907 Wayne Circuit Court
TERRANCE MARTEZ WILLIAMS, Defendant-Appellant.	LC No. 03-012592-01

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of malicious destruction of personal property over $1,000, but less than $20,000, MCL 750.377a(1)(b)(i), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to a two-year prison term for the felony-firearm conviction, followed by six months' probation for the malicious destruction of property conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that, on July 5, 2003, he fired several gunshots at the complainant's vehicle. The complainant testified that he met defendant while dating defendant's cousin, Paris, and, at the time of the incident, had known defendant for about a year. According to the complainant, defendant had three motorcycles and two cars. The complainant indicated that he remarked to Paris that they were probably stolen. Subsequently, Paris invited the complainant to her family's home for a July 4th gathering. After defendant arrived, he told the complainant that he needed to "hollar [sic] at [him] about something," and later confronted the complainant about telling Paris that his belongings were stolen. The complainant indicated that a brief altercation ensued and, when defendant's grandfather came to the door, he said that he did not want to disrespect defendant's grandparents' house and that "[they] can just take this away from here." Defendant did not respond, and subsequently left in a car. The complainant also left the gathering and went to a friend's house for about two hours.

As the complainant was en route to his house, which he shared with Paris, he received a phone call from Paris, and he told her that he was headed home. After the complainant pulled in his driveway and got out of the car, he saw three men on motorcycles. The complainant identified defendant as one of the three men. He could not recognize the other two men because they were wearing helmets. According to the complainant, defendant approached him and said,

"What's up, Greg." The complainant responded, "Oh, you gonna come to my house now." The complainant walked past defendant toward his door, and defendant allegedly stated, "I wouldn't do that if I were you." The complainant indicated that defendant then used a handgun to fire about six or seven shots into his car. Thereafter, defendant got on a motorcycle and the three men left. The complainant indicated that, as a result of defendant's actions, his car repairs totaled approximately $1,082.

The complainant's neighbor testified that, at approximately 3:00 A.M, he looked out his window and saw three motorcycles, two men wearing helmets, and a third man arguing with the complainant. The neighbor then saw the man arguing with the complainant fire a gun at the complainant's car, after which the three men left on the motorcycles. Although he saw the incident, he could not identify the perpetrator.

The responding Detroit police officer observed the damage to the complainant's vehicle, and found one forty-caliber Smith and Wesson shell casing. The officer indicated that the complainant described the gun as a blue steel automatic. In a statement made to the police, defendant admitted that he and the complainant had a "talk" at the family gathering and that, although the complainant wanted to fight him, they both left. Defendant claimed that he did not see the complainant again. Defendant admitted that he owned a forty-caliber "Glock" blue steel automatic handgun, but denied going to the complainant's house and firing a gun at his car.

II. Motion for a New Trial

Defendant's sole claim on appeal is that the trial court abused its discretion by denying his motion for a new trial, which was based on defendant's claim that he was denied the effective assistance of counsel at trial. Defendant contends that defense counsel's failure to subpoena two alibi witnesses and present his cell phone records and a tow receipt deprived him of a substantial defense, i.e., an alibi defense. We disagree.

A. Standard of Review

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 314-315; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d

774 (1998). Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). A claim of ineffective assistance of counsel cannot be premised upon the failure to present perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995).

B. Monica Ross

Defendant claims that trial counsel's failure to subpoena his girlfriend, Monica Ross, deprived him of a substantial defense.[1] Defendant contends that, if called, Ross would have testified that defendant was with her at her cousin's house at the time of the incident. However, we agree with the trial court that defendant has failed to overcome the presumption that defense counsel's decision not to subpoena Ross was sound trial strategy. *Rockey, supra* at 76.

Defense counsel testified at a post-conviction evidentiary hearing that, before trial, defendant told him that he was with Ross at the time of the incident and gave him Ross' telephone number. Defense counsel indicated that he phoned Ross several times to arrange a "face-to-face" meeting, but she failed to make herself available. He indicated that, after one phone conversation, he and Ross set a meeting, but Ross failed to attend. He further indicated that he explained to both defendant and Ross "several times" the importance of Ross meeting with him. When asked why he needed a "face-to-face" meeting with Ross, defense counsel testified that there were "some dissimilarities" in her statement, and he "wanted to be able to look her in the eye and to do what [he] felt was [his] requirement to evaluate her as a potential witness." He was also "concern[ed]" because Ross "was resistant to cooperating with him and the alibi," and "knowing that [Ross] was [defendant's] girlfriend and [defendant] being . . . in constant contact [with her], [he] was . . . confused as to why it was so difficult to get hold of her to make her available to do this." Defense counsel acknowledged that presenting an alibi witness could be damaging depending on the witness, and that he "wasn't going to produce a witness that [he] wasn't sure what [he] was going to get and take a risk of it blowing up on [them]."

Defendant and Ross both testified at the evidentiary hearing and provided testimony that corroborated much of defense counsel's testimony. Defendant testified that, from the date of the incident until the date of trial, he had contact with Ross about four or five times each week.[2] Ross testified that she was contacted by defense counsel at least twice, that she spoke to him each time for five to ten minutes, that he left a message on her answering machine at least once,

[1] Ross was listed on the prosecution's witness list.

[2] Defendant was on bond before the trial.

and that he gave her defendant's trial date. She initially did not recall ever having an appointment to meet with defense counsel, but later testified that she "may have" had one. She also testified that she "is not sure" if defense counsel contacted her during the week before trial. Defendant testified that defense counsel told him that he was having difficulty with contacting Ross. Defendant further testified that he "kept telling [Ross] to call [defense counsel] almost every time [he] talked to her," and also told Ross his trial date and asked her to come to court. Ross testified that, although defendant asked her to come to court for the trial, "[she] couldn't make it. [She] had [beauty school] finals." She further testified that she "really didn't take [the trial] that serious [sic] because [she] thought it was hearsay."

Defense counsel testified that, because he was never able to confirm the proposed alibi defense, his trial strategy was to explore the "bias between the two gentlemen" and attack the complainant's credibility. Counsel's trial strategy assessment was supported by the fact that Ross was uncooperative, unresponsive, and chose not to attend trial. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*.

C. Danielle Dixon

Defendant further claims that, in addition to Ross, defense counsel was ineffective for failing to subpoena Danielle Dixon, Ross' cousin, to support his alibi defense. Dixon testified at the evidentiary hearing that defendant came to her house with Ross at 12:30 A.M., and left at about 3:30 or 4:00 A.M. She indicated that, if called, she would have testified on defendant's behalf. Defense counsel testified that defendant did not give Dixon's name as a potential alibi witness and did not provide any means to reach her. Defense counsel indicated that, during a conversation with Ross, she mentioned Dixon. Defense counsel admitted that he took no steps to locate Dixon, rather, his focus was on investigating the only potential alibi witness that defendant named, i.e., Ross.

Defendant has failed to overcome the presumption that defense counsel's decision not to subpoena Dixon, but to focus on Ross, was sound trial strategy. *Rockey, supra* at 76. Defendant acknowledged that he did not give defense counsel Dixon's name but only described her as Ross' cousin. Further, because Ross was the person who named Dixon as a witness, and Ross' potential testimony was a "concern," defense counsel's decision to first investigate Ross before investigating a witness provided by Ross was not unreasonable. As previously indicated, we will not substitute our judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *Stewart (On Remand), supra* at 42.

Moreover, Dixon indicated that, although she was aware of defendant's arrest and the date of the alleged incident for which he was arrested, she did not come forward to the police or anyone else about defendant being at her house. Dixon also indicated that she saw defendant between his arrest for the incident and the trial date, and defendant never said anything to her about coming to court and testifying on his behalf. Indeed, it is compelling that Dixon did not come forward before or during defendant's trial, and defendant never requested her to do so. In sum, defendant has failed to sustain his burden of proving that he received ineffective assistance of counsel at trial on the basis of defense counsel's failure to subpoena Dixon. *Effinger, supra* at 69.

D. Inoperable Motorcycle

Next, defendant argues that defense counsel was ineffective for failing to present evidence that his motorcycle was towed before the incident and, thus, was inoperable at the time of the incident. At the evidentiary hearing, defendant testified that, during his first meeting with defense counsel, he told him that his motorcycle was inoperable at the time of the incident and subsequently offered him a copy of the tow receipt. Defense counsel testified that he did not recall defendant telling him that his motorcycle was inoperable, but he recalled defendant telling him that he had three motorcycles.

Even if we accept defendant's testimony that he told defense counsel that his motorcycle was inoperable, defendant cannot demonstrate that defense counsel's failure to present the proposed evidence deprived him of a substantial defense. It is highly improbable that the proposed evidence would have affected the outcome at trial. *Kelly*, *supra* at 526. At trial, the complainant testified that defendant had three motorcycles.[3] Furthermore, even if defendant owned only one motorcycle that was inoperable, that did not preclude the possibility that defendant could have been on someone else's motorcycle at the time of the incident. It was undisputed that defendant regularly rode motorcycles and had a chauffeur's license with a cycle endorsement. Accordingly, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to present the proposed evidence, the result of the proceeding would have been different. *Effinger*, *supra* at 69.

E. Cell Phone Records

Defendant also contends that defense counsel was ineffective for failing to present his July 5, 2003, cell phone records as part of an alibi defense. At the evidentiary hearing, defendant noted that his cell phone bill showed that he had incoming calls on July 5, 2003, at 2:59 A.M., 3:04 A.M., and 3:20 A.M., and that he also made outgoing calls. Defendant indicated that, because he could not use his cell phone while riding a motorcycle, the fact that his cell phone was in use assists in showing that he was not involved in the incident. Defense counsel testified that he did not recall defendant telling him that he had cell phone records to demonstrate that he was on the phone at the time of the alleged incident.

Even if defense counsel was aware of the cell phone records, defendant cannot demonstrate that he was deprived of a substantial defense by counsel's failure to produce them as part of an alibi defense. As noted by the trial court, "[o]bviously it is impossible to use 'cell' (or mobile) phone records to prove one's whereabouts for an alibi defense." More significantly, the cell phone records could have easily refuted the claimed alibi defense. As previously indicated, defendant indicated that he was with Ross. But the cell phone records showed that, between 12:30 A.M. and 3:45 A.M., defendant made five calls to Ross' home. Ross acknowledged that defendant did not "make a habit" of calling her home when they were together. Ross testified

[3] At the evidentiary hearing, defendant did not deny that he told defense counsel that he owned three motorcycles, but claimed that he told defense counsel that he had owned a total of three motorcycles since he began riding, and that he does not keep the same motorcycle every year.

that defendant may have been calling to talk to one of her brothers. When asked about the calls, defendant claimed that he called Ross' house to check on Ross' six-year-old daughter, whom Ross' mother was babysitting. The court noted that defendant's explanation was "farfetched."

In brief, whatever exculpatory value the cell phone records had to suggest that defendant did not commit the crime, they had at least as much inculpatory value for disproving the proposed alibi defense. Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged inaction, the result of the proceeding would have been different. *Id.*

F. New Trial

For the reasons discussed, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio